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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNIE JUAREZ,

Defendant and Appellant.

C041569

(Sup.Ct.No. SF085306A)

Following the denial of his motion to quash and traverse search warrants and suppress evidence (Pen. Code, § 1538.5), defendant Ernie Juarez pleaded no contest to two counts of possessing heroin for sale (Health & Saf. Code, § 11351), being armed during one heroin possession (Pen. Code, § 12022, subd. (a), and one count of child endangerment (Pen. Code, § 273a, subd. (a)). He was sentenced to an aggregate five-year prison term.

On appeal, defendant contends the trial court erred in denying his motions to quash and traverse the search warrants and failing to suppress the fruits of the authorized searches. Specifically, he argues he was entitled to an evidentiary hearing under *Franks v. Delaware* (1978) 438 U.S. 154 [57 L.Ed.2d 667] (*Franks*), because he made the requisite substantial showing that the search warrant affidavit contained deliberately false or reckless statements and omissions and the remaining content was insufficient to justify a finding of probable cause. We disagree, and affirm.

BACKGROUND

Defendant filed a motion to suppress and quash and traverse two search warrants. The first warrant, issued on April 3, 2002, authorized the search of defendant's house, personal property, person, and vehicles. Execution of the warrant on April 4, 2002, resulted in the seizure of brown heroin, indicia of sales, two scales, packaging material, and a storage center business card.

The second warrant, issued on April 4, 2002, authorized the search of a storage unit rented by the defendant. Execution of the second warrant resulted in seizure of a semi-automatic handgun, ammunition, brown heroin, and records in defendant's name. It is undisputed that the second warrant was based solely on evidence obtained pursuant to the first warrant.

A. The Affidavit¹

Members of the San Joaquin County Metropolitan Narcotics Task Force conducted a surveillance of defendant's home in Stockton on March 8, March 12, March 14, and April 2, 2002. Deputy Victor Rodriguez was the affiant and recounted the following incidents.

1. March 8

Rodriguez saw defendant drive away from the house in a white van. While he was gone, six men walked by the house. When defendant returned, the men approached the house, stayed one minute, and then left, four of them "looking at the palm of their hands." A surveilling officer recognized two of the men as heroin users. Deputy Rodriguez, the affiant, described this activity as "short stay traffic" related to narcotics sales.

2. March 12

The woman drove to a school, picked up a child, and returned to the home.

A man on a bicycle wearing a black baseball cap and jacket, with a full beard, went to a side door and knocked. The man handed an unknown object inside, and the door closed. The door opened, and the man reached inside. He left on his bicycle. Three officers followed the man and found him "inside a tent"

¹ The affidavits are substantially identical, with the inclusion of the results of the first warrant in the affidavit for the second warrant.

with two hypodermic syringes testing presumptive for opiates "next to [him]."

Two men drove up in a Dodge Neon. One talked on a cell phone. Both went inside the house and left in two minutes.

3. March 14

The woman took two children to school and went to a minimart.

A man in a Geo drove in while the woman was pulling in. The affiant claimed she raised a "few fingers" at the man. The man went inside, came out, played with a dog, put the dog in the car and drove away in the Geo. The Geo was registered to Ernie Benny Juarez.

Agent Zills, one of the Metro agents, went up to the house and knocked on the door. Defendant answered the door. The affiant claimed Zills told defendant "he was at the residence to purchase heroin." Zills attempted to purchase heroin "but [defendant] would not sell [heroin] to Agent Zills because [defendant] did not know Agent Zills personally, but told Agent Zills to bring someone back with him . . . that defendant knew and [he] would then sell heroin to Agent Zills." The affiant stated Zills saw defendant holding "a plastic bag containing a dark colored substance but was unable to identify if the substance was heroin."

A White man walked up to the door, stayed one minute, handed an object to a female, and the female handed an unknown object back. The man drove away.

The affiant described these activities as "short stay traffic related to the sales of narcotics."

4. April 2

The affiant described more short stay traffic. A White man on a bicycle knocked on the door, handed an object to defendant, and received an object.

Two White men knocked on the door. One man handed an object to defendant, and defendant shut the door. Defendant then handed an object to the man, who placed it in his "belly button."

A man and a woman arrived on bicycles. The woman went inside the house momentarily.

These incidents were described as "consistent with short stay traffic related to the sales of narcotics."

B. Defense Evidence

The facts in support of the motion to quash and traverse are found in four exhibits: a report of the investigation of the man on the bicycle on March 12 prepared by Detective Verber; videotaped surveillance of the encounters on March 12, 14, and April 2; affiant Rodriguez's own police report, and an augmented videotape including sound and footage omitted in exhibit B.² A

² It has been necessary to settle the record because appellate counsel discovered the trial court had lost the exhibits. First, the parties attempted to substitute new copies of Exhibit D. Appellate counsel discovered the admitted replacement was blank. A subsequent hearing produced an agreement that a new tape, exhibit D-1, was an accurate substitute. We have reviewed all the exhibits, including the videotapes.

detailed discussion of the alleged misstatements, falsehoods, and omissions is provided in the discussion.

DISCUSSION

Under the rule of *Franks v. Delaware, supra*, 438 U.S. 154 [57 L.Ed.2d 667], a defendant may challenge the truth of a search warrant affidavit. This is a two-step process.

"When presented with such a challenge, the lower courts must conduct an evidentiary hearing if a defendant makes a substantial showing that: (1) the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth and (2) the affidavit's remaining contents, after the false statements are excised, are insufficient to justify a finding of probable cause. At the evidentiary hearing, if the statements are proved by a preponderance of the evidence to be false or reckless, they must be considered excised. If the remaining contents of the affidavit are insufficient to establish probable cause, the warrant must be voided and any evidence seized pursuant to that warrant must be suppressed. [Citation.]' (*People v. Bradford* (1997) 15 Cal.4th 1229, 1297[], cert. den. sub nom. *Bradford v. California* (1998) 523 U.S. 1118 [] [140 L.Ed.2d 937], citing *Franks.*)" (*People v. Benjamin* (1999) 77 Cal.App.4th 264, 271-272.)

Omissions from the affidavit, in contrast, must be shown to be not only deliberate or reckless but also "material." (*People v. Kurland* (1980) 28 Cal.3d 376, 384.)

"The trial court's decision to not hold a *Franks* hearing is reviewed de novo on appeal. [Citation.]" (*People v. Sandlin*

(1991) 230 Cal.App.3d 1310, 1316, cert. den. sub nom. *Sandlin v. California* (1992) 502 U.S. 1058 [117 L.Ed.2d 107].)

We address defendant's contentions seriatim.

A. Deliberate Inclusion of Noncriminal Activity

First, defendant argues that the affidavit erroneously includes three transactions in the affidavit as examples of "short stay traffic." The affiant described the woman picking up a child from school on March 8 and taking children to school on March 12. The People agree that that these incidents are unconnected to narcotics sales and "this was apparent from the face of the affidavit." However, they contend this was "obviously" . . . "included" to present a complete picture of the traffic. We cannot determine any connection with illicit activity and shall assume for the sake of discussion that the inclusion of these incidents was to buttress the affiant's claim that there was extensive traffic at the house. The inclusion was deliberate, and we shall excise the incidents from the affidavit.

Next, defendant challenges the inclusion and mischaracterization of the visit of a young man who played with and picked up a dog. Although the affiant notes that his car was registered to "Ernie Benny Juarez," a review of the videotape voiceover commentary reveals the police observer *believed* the young man to be defendant's son. That belief is not included, which reinforces the argument that inclusion of the incident was deliberate. Moreover, the affiant states that the woman (who is also the woman taking the children to and from

school) waved fingers at the son, implying this was related to narcotics traffic. Our review of the videotaped surveillance reveals only a normal wave. There is no evidence of narcotics traffic or any basis for the affiant's conclusion. Therefore, this incident is also excised.

B. The Boren Transaction

Defendant contends there are omissions in the affidavit. We agree.

According to Detective Verber's report, the bearded man on the bicycle pursued by surveilling officers was identified as Stewart Boren. Detective Verber and his supervisor signed the report on March 18. We have compared Verber's report, the affiant's recounting of the encounter between defendant and Stewart Boren, which is on the videotape, and the affiant's description of detention of Boren.

Defendant contends that the recounting of the encounter between Boren and the house, and the detention contains misrepresentations and material omissions. Exhibit C, Detective Rodriguez's own report, refers to Detective Verber's report for the "details" of the detention. Defendant is correct that there are differences.

First, the affiant did not include that the pursuing officer lost sight of Boren for some time. However, the officer recognized Boren as the man at the door when he saw him at the homeless encampment. Hence, this omission is not material.

Second, the affiant stated Boren was found inside a tent with syringes. This is inaccurate. According to Detective

Berber, Boren was *outside* the tent. The affiant omits that Boren was with another man, Charles Planck. The affiant omits that neither man claimed ownership of the syringes found inside. Most importantly, the affiant omits that Boren told Verber he had obtained heroin a half hour before from a Hispanic male in his 20's named "Gilbert" at the Cherokee Market, who drives a little white car.

We conclude these omissions are material.

We also conclude that they are more than negligent, inasmuch as Rodriguez's own report of the incident refers to Verber's report, which confirms them. Moreover, Verber's report was prepared and approved weeks before the affidavit. We shall include these omissions in the affidavit for our review.

C. Detective Zills's Attempt to Buy Drugs

Defendant argues the attempted drug buy was misrepresented. We agree.

The attempt by Detective Zills to buy drugs from defendant is on the videotape and the voices are audible.³ Contrary to the affidavit, this conversation does not contain any mention of drugs. Zills said he wanted "one" or "a one." The affiant does not cite any training or expertise that would indicate this is a narcotics term. The affiant then recounts that defendant would not "sell" to Zills because he did not know him, and that

³ A transcript of the conversation is in defendant's motion to suppress and appears to be accurate.

defendant told Zills to bring someone back with him defendant knew and he would then sell heroin to him.

This is inaccurate. In fact, although Zills repeatedly states he is "Stewart's friend" and Stewart said defendant would take care of him, defendant states he did not know any Stewart. Defendant stated, "I don't know what to say . . . I can't help you, man." Only at the end of the colloquy does defendant tell Zills to bring Stewart back after Zills claimed Stewart had just been there. The record contains material omissions which render the encounter more ambiguous than the attempted drug buy in the affidavit. We include the omissions in our evaluation. Failure to accurately report the taped encounter must be seen as reckless or deliberate misstatement and a material omission.

D. Hand to Hand Exchanges

Defendant claims there was no evidence in any encounter of a "hand to hand" exchange. We disagree.

The March 8 encounters are not on videotape. Defendant did not challenge the inclusion of these encounters in the affidavit. There is no evidence that the six men who visited defendant's house, including two identified heroin users, did not have items in their palms which they examined.

On March 12, Stewart Boren is seen reaching into the door twice. On March 14, another white male reached into the door when the woman opened it. The woman handed something out. Thus, while defendant is correct that "objects" cannot be observed on the surveillance videotape, the motions made by certain visitors and occupants of the house are consistent with

those made by people passing items back and forth and inconsistent with other activity. Any inaccuracy is, therefore, due to an obvious inference from the circumstances and is necessarily negligent, at best.

This statement is not excluded.

E. Retesting

We now examine the reconstituted affidavit in order to determine whether it demonstrates probable cause. We exclude reference to the woman's activity, the visit of the young man, the statements that defendant discussed heroin with Zills and agreed to sell to him, and including the actual encounter with Boren and the actual conversation between Zills and defendant. Upon review, we conclude that defendant did not meet the second prong of the test for an evidentiary hearing, because the reconstituted affidavit did provide probable cause for a search warrant.

We so conclude because the affidavit still contains the visit of six men (two heroin users) on March 8 for one minute; the March 12 visit of two men for several minutes; the visit of the male and female on March 14, the April 2 visits of one man, two white men, and a white man and woman with some exchanges.

Further, although Boren claimed he bought heroin from someone else, it is uncontested that he was at defendant's house reaching inside the door at the time he admitted he bought heroin. And, although defendant does not discuss heroin with Zills, the conversation is directed at defendant helping Zills, who claims to be "sick" with something. While each of these

individual incidents, standing alone, might well be insufficient for probable cause, the cluster of incidents and the brief door visits, combine to support a finding of probable cause.

II.

Our review of the record reveals additional errors.

The trial court properly imposed a drug laboratory fee of \$50, which is required under Health and Safety Code section 11372.5 for each violation of Health and Safety Code section 11351. The trial court imposed one such fee, although the fee is applicable to both drug offenses. The abstract of judgment does not include any mention of the drug laboratory fee at all.

Further, the trial court failed to impose the state and county penalty assessments required under Penal Code section 1464 and Government Code section 76000. Because the error involves mandatory sentencing requirements and not discretionary sentencing choices, we will order the judgment modified to include the omitted assessments. (See *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153-1157; *People v. Terrell* (1999) 69 Cal.App.4th 1246, 1255-1257; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1520-1522.) In the interests of judicial economy, we do so without having requested supplemental briefing. A party claiming to be aggrieved by this procedure may petition for rehearing. (Gov. Code, § 68081.)

DISPOSITION

The judgment is affirmed, as modified. The judgment is modified to reflect imposition of two drug laboratory analysis fees of \$50 (Health & Saf. Code, § 11372.5), two state penalty

assessments of \$50 (Pen. Code, § 1464), and two county penalty assessments of \$35 (Gov. Code, § 76000). The trial court shall prepare a modified abstract of judgment and forward a certified copy to the Department of Corrections. In all other aspects, the judgment is affirmed.

MORRISON, J.

We concur:

BLEASE, Acting P.J.

ROBIE, J.